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SUMMARY RECORD OF THE 593rd MEETING

Held at Headquarters, New York,
on Tuesday, 4 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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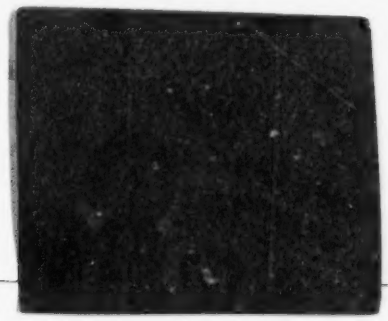

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The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/426)

Article 2 (continued)

1. Mr. BURMAN (United States of America), said his delegation too, would prefer to retain the wording of article 2, subparagraph (a), and to replace "analogous" by "similar". His delegation was greatly disturbed by efforts to introduce radical changes into a text which had already been painstakingly elaborated by the Working Group. Such redrafting could destroy the balance and consistency of the articles of the draft Model Law. He urged delegations to focus attention solely on a few remaining problems, with a view to finalizing the draft on time.

2. Ms. REMSU (Observer for Canada) said she supported the views expressed by the representatives of the United States, Australia and Germany and the observer for Denmark. Her delegation, too, felt that the wording of subparagraph (a) should remain unchanged. The word "analogous" should be replaced by "similar" and an explanation could be included in the draft Guide to Enactment of the Model Law (A/CN.9/426). As the Australian representative had pointed out, the words "generated and stored" should also be retained, in order to ensure that the article covered information that had been recorded and stored but not necessarily communicated.

3. Mr. BAUM (Observer for the International Chamber of Commerce) said he strongly supported both the remarks made by the secretariat at the previous meeting concerning the definitions and the appeal just issued by the United States representative. Members of the Commission should respect the intricate legal and technical work done by their predecessors and should not introduce radical changes.

4. Mr. MADRID (Spain) said he agreed with the United States representative on the need to finalize the draft speedily. Subparagraph (a) should make it clear that it covered only telegrams, telexes and telecopies transmitted by electronic means; that would avoid a paradoxical situation in which the Model Law applied when they were sent by other means. The Spanish version of the text contained the word "similar" and he had no objection to the term being used in English.

5. Mr. SORIEUL (International Trade Law Branch) said the issue was not one of drafting but rather of content and the scope of the Model Law. The Commission must identify common elements of electronic and optical systems in order to determine whether "similar" or "analogous" was more appropriate.

6. Mr. DONG Yi (China) said the word "analogous" could mean either "simi " or "analogous" in the sense of digital. Therefore, the word "similar" sh..ld be used for the sake of clarity.

7. Mr. ALLEN (United Kingdom) said he strongly supported the remarks made by the representative of the secretariat. If no common points were found between

optical and electronic means of transmission, the use of "similar" or "analogous" could be taken as including paper and other means, which would be disastrous. It might be preferable in that case to rely on a specific list which was as open to future developments as possible. He stressed that "digital analog", which had been widely supported at the previous meeting, referred to form and "electronic and optical" referred to means of transmission. The most effective wording would be "digital analog or light form", which left room for the inclusion of light technology in the future. Otherwise, the only solution was to delete "or analogous means" and simply say "by electronic and optical means". Indeed, the Working Group had never been completely satisfied with the use of "analogous" because the problem was one of logic, not merely drafting.

8. Ms. REMSU (Observer for Canada) said that if "similar" were eliminated, the result would be an unnecessarily restrictive list. One common feature of both electronic and optical means was that they were paperless. The term "paperless" might therefore be very apt, particularly since the Commission had already used it to describe the data message as a paperless exchange of information and a paperless recording.

9. Mr. LLOYD (Australia) noted that the formulations "electronic, optical" and "analogous" or "similar" were remarkably close to the wording of an article of the Australian Constitution on telegraphs and telephones which had never been misinterpreted in 96 years. He disagreed with the United Kingdom representative and the secretariat. Both article 2 and the entire draft Model Law were eminently clear. The use of "paperless" could be problematical, as telecopies and telexes were transmitted on paper.

10. Mr. ANDERSEN (Observer for Denmark) praised the Canadian suggestion, although his delegation still believed that the wording of subparagraph (a) should be left unchanged. Expressing support for the statement made by the United States representative, he suggested that proposals concerning issues should not be permitted to be discussed during Commission meetings unless they had been submitted beforehand in writing.

11. Mr. MADRID (Spain) said the word "electronic" should be retained. He expressed strong support for the Canadian suggestion to add the word "paperless" and also agreed with the remarks made by the Australian representative.

12. Mr. PHUA (Singapore) said that, in line with the remarks made by the United States representative, the carefully elaborated draft Model Law should not be changed. He agreed with the United Kingdom representative that the definition of "data message" had always been controversial in the Working Group and that its definition in the Model Law might have to be interpreted at a later stage. He also agreed with the secretariat's views on the use of "similar", for it was not clear what kind of technology embraced electronic, optical and analog digital means. If the draft Guide to Enactment could be expanded to specify that the data message was paperless, his delegation could accept the definition as it stood.

13. Mr. SCHNEIDER (Germany) said he agreed with the representative of Singapore. The word "similar" was not clear at all. With regard to the proposed use of the word "paperless" he noted that smoke signals and foghorns

were paperless but not necessarily electronic or optical. At the very least, definitions should include examples in order to help the reader. The text of subparagraph (a) should be left unchanged and the Guide to Enactment should be used for explanations.

14. Mr. CHOUKRI (Observer for Morocco) said subparagraph (a) could be left unchanged. The Arabic term for "analogous" presented no ambiguities. However, the reference to optical means of communication should be deleted from the text and included in the explanatory notes in the Guide to Enactment.

15. Mr. TELL (France) associated himself with the previous speakers who had favoured retaining the current text of subparagraph (a).

16. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for International Commercial Arbitration) said he, too, supported the retention of the subparagraph in its current form. The explanation of any ambiguities could be included in the Guide.

17. Mr. SORIEUL (International Trade Law Branch) said subparagraph (a) would be retained in its current form, and the explanation to be added to the Guide would concern the "paperless" aspect common to the various means of data interchange mentioned in the text.

18. The CHAIRMAN said there appeared to be a consensus that subparagraph (a) should be retained in its current form.

19. Mr. SORIEUL (International Trade Law Branch) said the text of subparagraph (b) had been drafted to resemble as closely as possible the definition of electronic data interchange (EDI) used by the Economic Commission for Europe, in that it referred specifically to communication between computers and the structured nature of the data being communicated. However, the question arose whether the manual transmission of electronic data as for example via diskette, fell within the definition of EDI.

20. Ms. BOSS (United States of America) said that such manual transfers of data could be included in the definition of EDI by changing the phrase "from computer to computer of" in subparagraph (b) to "of computer-based".

21. Mr. MASUD (Observer for Pakistan) suggested that the definition should include optical as well as electronic means of transferring information.

22. Mr. DONG Yi (China), supported by Mr. TELL (France), Mr. BAUM (Observer for the International Chamber of Commerce) and Mr. UCHIDA (Japan), said the Model Law's definition of EDI was consistent with those used by other international bodies such as the Economic and Social Council, and should be retained as currently formulated.

23. Mr. HOWLAND (United Kingdom) said he associated himself with previous speakers supporting the retention of subparagraph (b) as currently formulated. While structured electronic information could be transferred by physical means for subsequent processing by computer, the definition in subparagraph (a) was

broad enough to cover such transfers whether or not they fell within the strict definition of EDI.

24. Mr. SORIEUL (International Trade Law Branch) said the text of subparagraph (b) would be retained in its current form; the Guide would be amended to indicate that the definition of EDI included the manual exchange of electronic data on diskettes, provided the data was structured in a format agreed upon by the parties.

25. The CHAIRMAN said there appeared to be a consensus that subparagraph (b) should be retained in its current form.

26. Mr. HOWLAND (United Kingdom), supported by Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for International Commercial Arbitration), said that as currently formulated, the term "originator" in subparagraph (c) appeared to include both the sender of a data message and a recipient who stored it. He proposed that the words "prior to being" should be added to the text before "stored"; the words following "or communicated" would be deleted.

27. Mr. LLOYD (Australia), supported by Mr. BAUM (Observer for the International Chamber of Commerce), supported the United Kingdom proposal, with the further amendment that the words "stored or" should be removed entirely.

28. Mr. UCHIDA (Japan), supported by Mr. SCHNEIDER (Germany), Ms. BOSS (United States of America), Mr. FARIDI ARAGHI (Islamic Republic of Iran) and Mr. ANDERSEN (Observer for Denmark), said subparagraph (c) should be retained as currently formulated, except that the words "purports to have been" should be replaced by "has been". The corresponding note in the Guide would refer to the conditions of attribution contained in article 11 of the Model Law.

29. Ms. BOSS (United States of America) said the debate on article 2 had prompted her delegation to re-examine article 6, where the term "originator" appeared to be ambiguous; the problem could be solved by replacing "originator" by "signer" throughout article 6. Such a change would permit the deletion of the words "stored or" in article 2, subparagraph (c).

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

30. Mr. LLOYD (Australia) said it was essential to retain the words "purports to" in subparagraph (c) for the purposes of article 6 and article 11, paragraph 3 (b). In both of those articles there was a reliance on appearances rather than actuality. With respect to article 11 in particular, where a message was sent by an impersonator the proposed deletion would make the impersonator, in effect, the originator. It was thus important to define the originator as the person on whose behalf a data message purported to have been generated.

31. Mr. ALLEN (United Kingdom) agreed that it was essential to retain "purports to" in subparagraph (c) for the purposes of articles 6 and 11.

32. Mr. ANDERSEN (Observer for Denmark) said that in view of the amendments to article 11 proposed earlier in the session, subparagraph (c) would still be clear with the deletion proposed by the delegation of Japan.

33. Mr. PHUA (Singapore) said he agreed with the representatives of Australia and the United Kingdom that the words "purports to" should be retained in subparagraph (c). If an impersonator obtained the digital signature of an originator and a data message was then verified by an addressee using an agreed method, the impersonator would, as noted by the representative of Australia, in fact become the originator.

34. Mr. MADRID (Spain) said the word "presuntamente", which would convey the idea expressed in the English text by the word "purported", did not appear in the Spanish text, but his delegation would prefer to retain the current Spanish wording. The point at issue might be resolved by including in the Guide comments making it clear that the originator was to be defined in terms of a message having first been generated, then stored or communicated. That would avoid the possibility of a recipient who stored a message being categorized as an originator.

35. The CHAIRMAN said there appeared to be a consensus that subparagraph (c) should be retained in its current form, with a clarification in the Guide.

36. Mr. HOWLAND (United Kingdom) said there was no point in including in the Guide a clarification embodying a suggestion made by his delegation if that suggestion were not to be reflected in the article. While he would prefer to see an unambiguous statement in the text of the definition, if the rationale for the change was not accepted there was no point in including a contradictory statement in the Guide.

37. Mr. SORIEUL (International Trade Law Branch) said it might be useful to discuss the United Kingdom proposal further. It would certainly be inappropriate to resolve the difficulty in the text by a formulation in the Guide that effectively contradicted the text.

38. Mr. Won-Kyong KIM (Observer for the Republic of Korea) said further consideration should be given to the proposals made by the United Kingdom, Japan and the United States.

39. Mr. PHUA (Singapore) said the Working Group had concluded that the word "stored" should be retained so as not to give the impression that the Model Law was concerned only with the generation and communication of data messages.

40. Mr. SORIEUL (International Trade Law Branch) said the concern had been to ensure that the Model Law covered both situations where data messages were transmitted and situations where they were archived but not transmitted. The concept was not necessarily linked to that of the originator of the data message, and other solutions might be possible. It would clearly be strange if a person who merely stored a message were subsumed under the definition of originator. In any event the text before the Commission represented the Working Group's solution.

41. Ms. REMSU (Observer for Canada) said she agreed that the concern was to ensure that the Model Law accommodated records that were not communicated as well as those that were. Deletion of the word "stored" would raise the question whether data messages not transmitted were in fact covered. The United Kingdom proposal rightly placed the emphasis on the generation of the data message, which was the main activity of the originator. The Commission might wish to pursue that proposal further.

42. Mr. HOWLAND (United Kingdom) pointed out that his delegation had not proposed that the word "stored" should be deleted, since storage was an important aspect of the activities being referred to. The problem was that the definition, as currently drafted, included recipients who stored the messages they received; his delegation's proposal was intended to correct that error.

43. Mr. LLOYD (Australia) said the United Kingdom proposal would make subparagraph (c) consistent with the rest of the text. The words "the originator" in articles 11 to 14 implied that each data message had only one originator. However, subparagraph (c) currently implied that a data message could have multiple originators, since a message could be generated, stored and communicated by different people. The advantage of the United Kingdom proposal was that it defined the originator as the person who generated the message.

44. Mr. CHOUKRI (Observer for Morocco) said he disagreed with the United States proposal to replace "originator" by "signer" in article 6, because the Model Law did not define the term "signer". That could lead to confusion; for example, article 2, subparagraph (c) specified that the definition of "originator" excluded intermediaries, but it was not clear whether a "signer" could be an intermediary. He also disagreed with the proposal to delete the word "stored" from subparagraph (c), because the Model Law itself referred to situations where originators stored messages; for example, article 12 dealt with the interval between the sending of a message and the acknowledgement of receipt, during which the originator presumably stored the message.

45. Ms. BOSS (United States of America) said she understood the concern of the observer for Morocco about the use of a new term, and agreed to leave article 6 unchanged for the time being. With respect to article 2, subparagraph (c), she was willing to retain the word "stored" as long as emphasis was placed on the idea of communication, which was the subject of chapter III of the Model Law. The problem with the United Kingdom proposal was that it focused on the generation of a data message and made communication seem irrelevant, whereas all of the articles in chapter III concerned the sending and receiving of data messages.

46. Mr. TELL (France) said he shared the United States delegation's views on the United Kingdom proposal; the latter appeared to dissociate the generation of a data message from its storage or communication, thereby implying that a message could have more than one originator. He wondered whether the current text already addressed the concern expressed by the observer for Canada about ensuring that the Model Law covered the storage of data messages.

47. Mr. MASUD (Observer for Pakistan) said he agreed with the United States delegation that the United Kingdom proposal failed to emphasize the idea of

communication. Moreover, he did not agree that the words following "communicated" in subparagraph (c) should be deleted, since that change was unrelated to the rest of the United Kingdom proposal, and it was important to specify that an intermediary could not be considered an originator.

48. Mr. SORIEUL (International Trade Law Branch) said the Commission had identified a flaw in the text of subparagraph (c) which the Working Group had been unable to correct. He suggested that since no consensus had been reached, the Commission should adopt the subparagraph as currently drafted and decide how that flaw should be dealt with in the Guide.

49. Mr. MADRID (Spain) said that if the generator and the originator of a data message were considered to be one and the same, the problem noted by the United States was only theoretical. If it was assumed that the communicator of a message was either the generator - in which case no problem arose - or a third party who sent the message on behalf of the generator, so that the originator was not the sender but the person on whose behalf the message was sent, then the United Kingdom proposal was an acceptable solution that deviated only slightly from the current text.

50. Ms. BOSS (United States of America) suggested that the United Kingdom proposal should be amended so that subparagraph (c) would end with the words "and communicated prior to storage". That would solve the problem posed by the reference to storage, while still ensuring that the Model Law covered stored data messages; it also preserved the idea that communication was a key component of the definition of an originator. Because no formulation could cover all possible situations, the Guide should give specific examples of how the definition of "originator" applied in each case.

51. Mr. PHUA (Singapore) said he supported the United States proposal.

52. Mr. ALLEN (United Kingdom) said the United States proposal only covered cases where data messages were both generated and communicated, and failed to address the concern of the observer for Canada about messages that were generated and stored, but not communicated. Conversely, it also failed to cover cases where messages were communicated but not stored. The real issue to be decided was whether the originator of a message that was communicated was the generator or the communicator, in cases where the two were not one and the same.

53. The CHAIRMAN suggested that the word "and" in the United States proposal should be changed to "or".

54. Mr. ALLEN (United Kingdom) said the subparagraph would still imply that messages were always stored after being communicated. However, the word "or" would be preferable to "and".

55. Ms. BOSS (United States of America) said the difficulty would be eliminated if the wording was changed to "prior to any storage". She agreed with the United Kingdom on the substantive point at issue, and felt that chapter III of the Model Law, which dealt with communication, assumed that the communicator, and not the generator, was the originator of a data message. Another possible

solution was to exclude the idea of generation from the definition of "originator", since it was unnecessary for the purposes of chapter III.

ELECTION OF OFFICERS (continued)

56. Mr. BURMAN (United States of America) nominated Mr. Illescas (Spain) for the office of Rapporteur.

57. Mr. Illescas (Spain) was elected Rapporteur by acclamation.

The meeting rose at 1.05 p.m.